IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ERNEST LANE, III, as EXECUTOR OF THE ESTATE OF JAMES OLDRUM SMITH, JR. and LIMESTONE PRODUCTS, INC. **APPELLANTS**

VS. **NO. 2013-CA-00554**

RONALD D. LAMPKIN **APPELLEE**

ON APPEAL FROM
THE CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CAUSE NO. 2007-151GN

APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

In the instant action, Appellants, Defendants in the court below (hereinafter referred to as "Defendants") appealed a judgment (hereinafter referred to as "Judgment") rendered by the Chancery Court of Warren County, Mississippi determining damages owed by Appellee, Plaintiff in the court below (hereinafter referred to as "Plaintiff"), based on the Plaintiff's breaching of fiduciary duties owed Defendants and usurping a corporate opportunity. This Court affirmed the Chancellor's decision, finding no error and determining the Chancellor's decision was supported by law, as well as evidence in the record. However, Defendants contend it is absolutely clear that the Judgment was entirely contradictory to all law, as well as all evidence in the record. In fact, the Judgment evidences a blatant abuse of discretion, as well as clearly erroneous mistakes of law and fact.

As this Court pointed out in its Opinion (hereinafter referred to as "Opinion"), Defendants have appealed the award of damages entered by the Chancellor as to "(1) whether the [C]hancellor erred by admitting and relying on testimony from [Plaintiff's] expert; (2) whether the [C]hancellor properly assessed the amount of damages due to the corporation; and (3) whether the [C]hancellor erred by refusing to award attorneys' fees and expert-witness fees."[1]

First, the Chancellor absolutely erred by relying on the testimony of Plaintiff's expert, as it was completely unsupported by any case law and, perhaps most importantly, was entirely contradictory to all reliable principles and methods used within the accounting and financial industries, which, according to Rule 702 of the Mississippi Rules of Evidence, must be considered, adhered to, and applied by our courts in determining the reliability of an expert witness. Further, this testimony was contradictory to all applicable case law. It is painfully

[1] *Lane v. Lampkin*, 2014 WL 4548870, at ¶ 6 (Miss. Ct. App. 2014).

obvious that the Chancellor gave no such consideration to these principles and methods in blatant disregard of Rule 702 of the Mississippi Rules of Evidence.

Second, for the very same reasons listed directly above, the Chancellor absolutely did not properly assess the amount of damages due the corporation, as the damages were calculated in complete contradiction to all applicable case law, as well as all reliable principles and methods used within the accounting and financial industries, which, according to Rule 702 of the Mississippi Rules of Evidence, must be considered, adhered to, and applied by our courts in assessing damages in the instant case.

Third, the Chancellor absolutely erred in refusing to award attorneys' fees and expert-witness fees, as Plaintiff's theft of an entire business in complete disregard of its shareholders was grossly negligent or sufficiently egregious and wanton as to permit an award of punitive damages, thus warranting an award of attorney's fees and expert-witness fees. This is supported by all law applicable the circumstance of this particular case.

STANDARD OF REVIEW

In a bench trial the trial judge sits as the trier of fact and is accorded the same deference in regard to his findings as that of a Chancellor, and the reviewing court must consider the entire record and is obligated to affirm where there is substantial evidence in the record to support the trial court's findings."[2] "The findings of the trial judge will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied."[3] In bench trials such as this, a Circuit Judge is subject to the same standard of review as that of a Chancellor.[4] Therefore, the Circuit Judge's decision will not be disturbed as long as substantial, credible, and reasonable evidence exists to support the ruling.[5] When supported by substantial evidence, a chancellor's findings of fact will not be disturbed on appeal unless the chancellor abused his discretion, was manifestly wrong, was clearly erroneous, or applied an erroneous legal standard.[6] As the reviewing court, this Court should examine the entire record and accept as true all "evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact. That there may be other evidence to the contrary is irrelevant."[7] As to questions of law, however, [this Court] applies a de novo standard of review.[8]

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[2] *Barnett v. Lauderdale County Bd. of Supervisors,* 880 So.2d 1085, 1088(¶ 7) (Miss. Ct. App. 2004).
[3] *Id.*
[4] *Sweet Home Water & Sewer Ass'n v. Lexington Estates Ltd.*, 613 So.2d 864, 872 (Miss. 1993).
[5] *Allied Steel Corp. v. Cooper*, 607 So.2d 113, 119 (Miss. 1992); *DePriest v. Barber*, 798 So.2d 456, 459 (¶ 10) (Miss. 2001).
[6] *Biglane v. Under the Hill Corp.*, 949 So. 2d 9, 13-14 (¶17) (Miss. 2007).
[7] *Par Indus. Inc. v. Target Container Co.,* 708 So. 2d 44, 47 (¶4) (Miss. 1998) (citation and internal quotation marks omitted).
[8] *Id.* at (¶5).

FACTS

In 1995, Ronnie Lampkin (hereinafter referred to as "Lampkin" or "Plaintiff") and J.O. Smith, Jr. (hereinafter referred to as "Smith") formed a corporation known as Limestone Products, Inc. (hereinafter referred to as "Limestone" or the "corporation"). Prior to forming Limestone, Lampkin, via Lampkin Construction Company, was operating a rock yard. The rock yard was located on the Mississippi River on land owned by the city of Vicksburg.

When Limestone was formed, they continued to operate on the yard owned by Vicksburg where Lampkin Construction had operated its rock yard. The company utilized that lot until 1999 when the city of Vicksburg decided not to renew their lease. When they lost the Vicksburg lease, Limestone moved its operation to a piece of property owned by Mr. Smith.

According to Lampkin, he and Mr. Smith made an agreement at that time that Mr. Smith would transfer a one-half (1/2) interest in the real property to Lampkin in exchange for Lampkin transferring equipment and scales (which were owned by Lampkin Construction) to Limestone, in exchange for Lampkin Construction Company buying it's rock from Limestone.

Smith died on August 24, 2006, resulting in a transfer of his stock to his Estate (the "Defendants"). Limestone's line of credit was set to expire in September, 2006. Prior to the expiration of the line, Lampkin requested a ninety (90) day extension to December 8, 2006, to determine whether the Estate would agree to guarantee the loan. Lampkin refused to allow the Estate, as a fifty percent shareholder, to inspect the books and records of the company in order for the Estate to make an informed decision with respect to the line of credit, despite their absolute right to inspect said books and records as shareholders. The Estate did not guarantee the line before the December 8, 2006 deadline. On December 19, 2006, Lampkin started Delta Stone which went into operation in January of 2007. This new company was essentially Limestone with a new name and used all of Limestone's assets to conduct its business.

The main issue before the trial Court was whether Lampkin breached his fiduciary duty to Limestone Products through usurping a corporate opportunity by starting his new business, Delta Stone. The trial Court found that Lampkin was an officer and director of Limestone. As such, Lampkin had a fiduciary duty to the business and the Defendants, as the other shareholders. Through the forming of Delta Stone, the trial Court found Lampkin breached this fiduciary duty to Limestone. Furthermore, the trial Court found that Limestone's financial capacity to continue its business operations was hindered by Lampkin's failure to timely provide the financial information needed for the Estate to determine whether it should guarantee the line of credit.

Having found that Lampkin breached his fiduciary duty and usurped a corporate opportunity, the Chancellor found there to be damages in the amounts of $125,546.32 and $104,570.00 based on the value of the business assets and lost income, respectively. As the total damages were $230,116.32 due Limestone; the estate of Smith, a fifty percent (50%) shareholder of the corporation, was directed to receive one-half (1/2) of this amount, or $115,058.16.

ARGUMENT

I. Whether the Chancellor erred by admitting and relying on testimony from Plaintiff's expert.

a. Reliable Principles and Methods.

Rule 702 of the Mississippi Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) ***the testimony is the product of reliable principles and methods***, and (3) the witness has applied the principles and methods reliably to the facts of the case.[9]

[9] Miss. R. Evid. 702.

In *McLemore*, the Supreme Court of Mississippi adopted the test to determine admissibility of expert witness testimony stated in *Daubert v. Merrell Dow Pharmaceuticals., Inc.*,(citation omitted), and as modified in *Kumho Tire Co. v. Carmichael* (citation omitted).[10] Expert testimony is admissible, pursuant to Rule 702, if it is relevant and reliable.[11] In *Adcock,* the Supreme Court of the State of Mississippi stated the following:

> The party offering the expert testimony also ***must show that the expert's opinion is based upon scientific methods and procedures***, not unsupported speculation. *Id.* at 36 (citing *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786). Factors to consider may include "whether the theory or technique can be and has been tested; ***whether it has been subjected to peer review and publication***; whether ... there is a high known or potential rate of error; ***whether there are standards controlling the technique's operation***; and ***whether the theory or technique enjoys general acceptance" within the expert's particular field***. *McLemore,* 863 So.2d. at 37 (citing *Daubert,* 509 U.S. at 592-94, 113 S.Ct. 2786).[12]

In the instant matter, the damage calculation testimonies must be "the product of reliable principles and methods."[13] Similarly, the appropriate *Daubert* factor in determining whether or not the damage calculations are reliable is "whether the theory or technique enjoys general acceptance."[14] This factor was greatly emphasized in the Committee Notes on Rules after the 2000 Amendment to Rule 702 of the Federal Rules of Civil Procedure, which was the test adopted by the Supreme Court of Mississippi in *McClemore*. The following excerpt from these Committee Notes clearly explains how these factors must be met in order for testimony to be considered reliable, even with nonscientific experts:

> ***The Court in Daubert declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate***." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). ***Under the amendment, as under Daubert, when an expert purports***

[10] *Miss. Transp. Com'n v. McLemore,* 863 So.2d 31, at 35 (¶ 5) (Miss. 2003).
[11] *Id.* at 38; *Tunica County v. Matthews,* 926 So.2d 209, 213 (¶ 6) (Miss. 2006).
[12] *Adcock v. Miss. Transp. Com'n,* 981 So.2d at 947 (¶ 16) (Miss. 2008).
[13] Miss. R. Evid. 702.
[14] *McLemore,* 863 So.2d. at 37 (¶ 13) (citing *Daubert,* 509 U.S. at 592-94, 113 S.Ct. 2786).

to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc*., 89 F.3d 594, 598 (9th Cir. 1996). ***The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case***. As the court noted in *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 745 (3d Cir. 1994), "***any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible***. ***This is true whether the step completely changes a reliable methodology or merely misapplies that methodology***."

. . . .

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) ("***We conclude that Daubert's general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.***").

. . . .

…***Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise***. ***The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded***. *See, e.g*., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, ***accounting standards***, property valuation or other non-scientific subjects, ***it should be evaluated by reference to the 'knowledge and experience' of that particular field***.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge.

. . . .

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony

> should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co*., 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).[15]

As this Court noted, "[t]he experts' testimony varied greatly as to the proper valuation for Limestone, and the chancellor found that the experts were 'just splitting hairs' and getting 'bogged down' in an argument over the proper terminology to describe Limestone's valuation."[16] This Court continued, "[t]he chancellor stated, '[w]hether you call it asset based or net book value or lost profits, this [c]ourt is merely concerned with how and when to value this business."[17] This very statement clearly exhibits the Chancellor's misunderstanding of the issues and the importance of differentiating between a business valuation and a lost profits analysis. The two (2) concepts are entirely different things and apply to entirely different situations. This is undeniably supported by all applicable case law, as well as reliable principles and methodology utilized within the accounting and valuation fields.

In the following excerpt from their initial appellate brief, Defendants explained how Plaintiff's expert's opinions were not based on reliable principles and methods, which, according to Rule 702 of the Mississippi Rules of Evidence, must be considered, adhered to, and applied by our courts in assessing damages in the instant case:

> It is important to remember that both experts are certified public accountants and members of the American Institute of Certified Public Accountants (hereinafter referred to as "AICPA" or "the AICPA"). As such, they are required to follow the AICPA's Code of Professional Conduct, which states the following:
>
> > Rule 202—Compliance With Standards. A member who performs auditing, review, compilation, management consulting, tax, or other professional services ***shall comply with standards*** promulgated by bodies designated by Council. [As adopted January 12, 1988.]

[15] Fed. R. Evid. 702, Comm. Notes on Rules – 2000 Amendment (emphasis added).
[16] *Lane v. Lampkin*, ¶ 17.
[17] *Id*.

1. The unreliability of the Plaintiff's expert.

In formulating his expert opinion and testimony, Mr. Saunders has admitted in his Expert Witness Report the following:

> The methodology used in performing my procedures to arrive at my conclusions and opinions involves methods utilized by other CPAs in my profession. ***I have adhered to the American Institute of Certified Public Accountants' professional standard applicable to litigation services including the Statement on Standards for Consulting Services and our Code of Professional Conduct***.

. . . .

Publications promulgated by the AICPA clearly address situations where the differing analyses are appropriate. ***In the AICPA's Statement on Standards for Valuation Services, valuations of businesses may be performed for a variety of purposes, including "litigation (or pending litigation) relating to matters such as marital dissolution, bankruptcy, contractual disputes, owner disputes, dissenting shareholder and minority ownership oppression cases, and employment and intellectual property disputes." This statement is not applicable to "engagements that are exclusively for the purpose of determining economic damages (for example, lost profits)." In fact, the AICPA has published Practice Aid 06-4, entitled Calculating Lost Profits, to address situations where, as in the matter at hand, "damage analyses are prepared to provide an estimate of the detriment suffered by one party as a result of a wrongful act of another party."***

. . . .

Based on Mr. Saunders' Expert Witness Report, it is clear that he employed a business valuation analysis, as opposed to a determination of economic damages in the nature of lost profits.

. . . .

Based on Mr. Saunders' testimony, it is also clear that he employed a business valuation analysis, as opposed to a determination of economic damages in the nature of lost profits.

. . . .

When referring to his Expert Witness Report, Mr. Saunders states, "This is my expert report. Within it, is my *valuation* [emphasis added]." ***When discussing sources relied on in formulating his opinion, specifically materials published by Practitioner's Publishing Company; Mr. Saunders states, "I did rely on that. I relied on AICPA, there are numerous valuation things that I've read over the years***." Similarly, later in the cross-examination, Mr. Saunders states, "***There are numerous things I've relied in valuation plus my overall experience of having done it over the years***."

. . . .

Mr. Saunders' trial testimony and Expert Witness Report undeniably utilized a business valuation analysis, as opposed to a lost profits analysis. ***Materials published by the AICPA are very clear that "engagements that are exclusively for the purpose of determining economic damages (for example, lost***

profits)" are "specifically excluded" from the Statement on Standards for Valuation Services.

. . . .

Assume, for an instance, that the subject of this litigation involves a dissenting shareholder action, whereby a valuation analysis would be appropriate. If this were the case, Mr. Saunders' methodology would still have to comply with the provisions in the *Statement on Standards for Valuation Services*, as well as methods accepted as reliable in the field.

. . . .

The AICPA's *Statement* states, "the valuation analyst should consider the three most common valuation approaches: Income (Income-based) approach; Asset (Asset-based) approach or cost approach; and Market (Market-based) approach. Instead of using one of the three (3) common valuation approaches above, Mr. Saunders Expert Witness Report bases the entire analysis on the concept of "net book value."

Mr. Saunders offers no documentation or support for his valuation using "net book value." In fact, publications in the valuation industry make a strong case against using the phrase "net book value." In the textbook, Valuing a Business: The Analysis and Appraisal of Closely Held Companies, 4th Edition, authored by Dr. Shannon P. Pratt, the following comparison is made between an asset-based approach and book value:

> ***It is important to distinguish between the application of any asset-based approach valuation method and simple reliance on accounting "book value" to conclude a value estimate. Under any standard of value, the true economic value of a business enterprise equals the company's accounting book value only by coincidence. More likely than not, the true economic value of a company will be either higher or lower than its accounting book value. There is no theoretical support, conceptual reasoning, or empirical data to suggest that the value of a business enterprise (under any standard of value) will necessarily equal the company's accounting book value [emphasis added].***
>
> ***From a valuation perspective, the terms book value or net book value are merely accounting jargon. This is because book value is not related to economic value, or to the valuation process, at all [emphasis added].***
>
> . . . .
>
> ***In any event, accounting book value is not a recommended business valuation method. In fact, accounting book value is not a business valuation method at all, although it's popular in buy-sell agreement formulas. The quantification of accounting book value is not an asset-based valuation method. It is generally inappropriate to estimate a business valuation based solely on accounting book value [emphasis added]. The values presented on the cost-based balance sheet are usually not representative of a current economic for business valuation purposes. Also, there may be one or more intangible asset***

> ***accounts or contingent liability accounts that should be considered in a business valuation-but that are not presented on the cost-basis balance sheet at all.***
>
> ***The author of the above passage, Dr. Shannon P. Pratt, was also an author of PPC's Guide to Business Valuations, a publication Mr. Saunders admitted to using in formulating his expert opinion. This publication also refers to "book value" as an "accounting term." Additionally, in Financial Valuation: Applications and Models, James R. Hitchner states, "Book value, which pertains to cost basis accounting financial statements, is not fair market value." Mr. Hitchner was also an author of PPC's Guide to Business Valuations, which was consulted by Mr. Saunders.***[18]

This case is NOT a situation where a business valuation analysis is appropriate. Rather, as Defendants and the dissent clearly pointed out, a lost profits analysis is appropriate when calculating damages due to a ***breach of fiduciary duty***.[19] Also, a lost profits analysis is appropriate when calculating damages due to the ***usurping of a corporate opportunity***.[20] The dissent correctly states, "[t]here is simply no legal authority for the chancellor to consider a business-valuation analysis for a claim of breach of fiduciary duty or usurpation of corporate opportunity.[21] The Chancellor should not be looking at what a willing buyer would pay for the company on a given date; rather, the Chancellor should have focused on what Defendants lost over the years by not being able to participate as a shareholder in the business.

The AICPA is arguably one of, if not the, most preeminent authority in the accounting and valuation fields when it concerns reliable principles and methods within said fields. The other authorities cited were written by the most preeminent practitioners in these fields. Yet, Plaintiff's expert's business valuation analysis flies in the face of all standards promulgated by the AICPA, as well as all materials published by these practitioners. Further, even assuming a

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[18] Appellants' Br. at 14-24 (emphasis added)(internal citations omitted).
[19] *Griffith v. Griffith*, 997 So.2d 218, at 223 (Miss. Ct. App. 2008)(emphasis added).
[20] *Aqua-Culture Technologies, Ltd. v. Holly*, 677 So.2d 171 (Miss. 1996)(emphasis added).
[21] *Lane v. Lampkin*, ¶ 59.

business valuation were appropriate, Plaintiff's expert's methodology is entirely inconsistent with the aforementioned standards and materials, as well as reliable principles and methods.

Plaintiff's expert did "reach[]a conclusion that other experts in the field would not reach."[22] The Chancellor did not "scrutinize not [] the principles and methods used by the expert, but also [did not scrutinize] whether those principles and methods ha[d] been properly applied to the facts of the case" despite the Rule's requirement that the Chancellor "must" do so.[23] Not only did "any step" "render[] the analysis unreliable," which would, in turn, "render[] the…testimony inadmissible;" rather, ***every*** step of the Plaintiff's expert rendered the analysis unreliable.[24] Plaintiff's expert's testimony was simply not "grounded in an accepted body of learning or experience in the expert's field."[25]

Therefore, it is not a stretch to say that none of Plaintiff's expert's testimony was based on reliable principles and methods or any applicable case law. In fact, this statement could not be any closer to the truth. Sadly, the Chancellor failed to do more than "tak[e] the [Plaintiff's] expert's word for it."[26] Defendants would remind this Court that Defendants' initial appellate brief spent an extraordinary amount of time discussing how their expert's testimony conformed to reliable principles and methods within the accounting and valuation fields, as well as with the applicable Mississippi case law, which are practically identical.[27]

b. Conflict of Interest.

This Court correctly asserted, "[t]he Executors also argue, without providing any supporting caselaw, that [Plaintiff's expert's] testimony was unreliable due to a conflict of

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[22] Fed. R. Evid. 702, Comm. Notes on Rules – 2000 Amendment (emphasis added).
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.; see also, *Lane v. Lampkin*, ¶ 29 – 31.
[27] Appellants' Br. at 27 – 38.

interest that compromised his objectivity. As reflected in the record, Saunders'[] firm performed tax work for Lampkin personally and for Lampkin's businesses, including Limestone and Delta Stone."[28] Defendants admit no case law was cited, as Defendants' counsel was unable to locate any case law directly on point, i.e., conflicts of interest involving accounting and valuation experts. Since the Opinion was rendered, Defendants have been able to find one (1) case referencing a conflict among expert witnesses, albeit with respect to a medical malpractice case and wrongful death suit.[29] In this particular case, the court stated, "Through discovery, Mattie designated William Truly, M. D., as her expert witness, and served a copy of his opinion. It soon became evident that Dr. Truly could not testify for Mattie because of a conflict of interest (***Dr. Truly was on staff at the Madison County Medical Clinic, a defendant in the lawsuit***). Therefore, Mattie substituted Ronald Myers, M. D., as her expert witness."[30] As just referenced above, Plaintiff's expert was employed by Plaintiff, the party ordered to pay damages.

Of course, it is not surprising to see a small amount of case on point, if any. After all, cases involving conflicts of interest are generally related to an attorney's conflict, not expert witnesses. Even then, while case law can be helpful, conflicts among lawyers are not rooted in case law; rather, they are rooted in the Mississippi Code of Professional Conduct. Similarly, conflicts of interest among accountants are rooted in the AICPA's Code of Professional Conduct, the relevant portions of which were discussed in Defendants' initial brief.[31]

To be clear, Defendants never stated Plaintiff's expert's "testimony was unreliable due to a conflict of interest."[32] Rather, Defendants asserted the testimony "may" have been unreliable,

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[28] *Lane v. Lampkin*, ¶ 25.
[29] *Cheeks v. Bio-Medical Applications*, 908 So.2d 117 (Miss. 2005).
[30] *Id.*, at ¶ 3.
[31] Appellants' Br. at 24-26
[32] *Lane v. Lampkin*, at ¶ 25.

it "seems" a conflict existed, and the matter "appeared" to be riddled with conflict.[33] Regardless, Plaintiff's expert completely deviated from reliable principles and methods when calculating damages; and Plaintiff's expert's damages calculations were more favorable to Plaintiff.

II. Whether the Chancellor properly assessed the amount of damages due the corporation.

The Chancellor's award of damages was inadequate to the point that the Chancellor clearly "abused his discretion" and the award was "so gross as to be contrary to right reason."[34] This Court noted, "[t]he Executors seek lost profits instead of lost income."[35] This is absolutely true, as lost profits, not lost income, is the proper measure of damages based on reliable principles and methods in the accounting and valuation fields. Indeed, this Court acknowledged "it is lost profits and ***not lost income*** which is the proper measure of damages…"[36]

a. The Chancellor's Accounting Methods.

This Court noted, "[i]n calculating the amount of damages owed to Limestone, the [C]hancellor cited *Lovett v. E.L. Garner, Inc*. for his finding that 'historical lost net profits' is an acceptable method to use in cases involving breach of contract."[37] The facts of the *Lovett* case clearly demonstrate why this method, which is only "one way to show damages," was acceptable in that case but not in this case.[38] In *Lovett*, the court stated the following:

> In the instant case, Garner utilized past profits, but in a way that was misleading. Indeed, as Lovett points out, he was entitled to a four cent per gallon guarantee. As such, Garner was not necessarily entitled to one-half of the net profits per month. Instead, Garner was entitled to what was left over after Lovett received his four cent per gallon guarantee, regardless of whether that constituted one-half of the net profits or not. Accordingly, although Garner based its projection of future

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[33] Appellants' Br., at 24 & 26.
[34] *Greater Canton Ford Mercury, Inc. v. Lane*, 997 So.2d 198, 206 (¶ 30)(Miss. 2008).
[35] *Lane v. Lampkin*, at ¶ 32.
[36] *Id*., at ¶ 35 (citing *Lynn v. Soterra, Inc*., 802 So.2d 162, 171 (¶ 33)(Miss. Ct. App. 2001)(citing *City of New Albany v. Barkley*, 510 So.2d 805, 807 (Miss. 1987))(emphasis added).
[37] *Lane v. Lampkin*, ¶ 34 (citing *Lovett v. E.L. Garner, Inc*., 511 So.2d 1346, 1353 (Miss. 1987)).
[38] *Lane v. Lampkin*, ¶35 (citing *Sanders v. Dantzler*, 375 So.2d 774)(Miss. 1979).

> profits on its past profits, such projections were misleading and resulted in inaccurate amounts for future profits.[39]

Thus, trial court completely ignored a contract between the parties, as well as "[v]ariables such as inflation, market availability, etc.;" further, the "future profits were not [appropriately] discounted."[40] Based on these facts, the *Lovett* court determined the trial court's award of "future profits quite speculative and, indeed, downright erroneous."[41] Garner could not ignore that Lovett was entitled to four cents per gallon according to an enforceable contract; and, as such, this four cents per gallon must be factored into any computation of lost profits. Ironically, the Chancellor committed the same error as Garner by failing to award damages with respect to the lease agreement. Garner could not ignore the four cents per gallon contract, and Plaintiff cannot ignore the lease agreement. Therefore, the Chancellor's reliance on *Lovett* is misguided.

Based on the facts of the instant case, the Chancellor's award of damages was equally erroneous. After all, another court has noted, "[w]hile the *Lovett* Court acknowledged the utilization of data pertaining to past profits in order to determine present and future lost profits, it rejected the submission of such evidence when it was misleading or resulted in inaccurate amounts for future profits."[42] In the instant action, past profits would, in no way, be indicative of future lost profits, as they fail to take into account anything Plaintiff did after breaching his fiduciary duties and usurping the corporate opportunity. Perhaps most importantly, past profits would not take into account the fact that Plaintiff greatly increased the price of rock being sold. Defendants' expert pointed out the following at trial:

> And what you'll see is that the prices in 2003 –well, we will just pick one. Product number 200 it shows the cost was $4.00 a ton and it sold for $11.24. If

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[39] *Lovett v. E.L. Garner, Inc*., 511 So.2d 1346, 1353 (Miss. 1987)
[40] *Id*.
[41] *Id*.
[42] *J&B Entertainment v. City of Jackson, Mississippi,* et al., 720 F. Supp.2d 757, at 764-765 (S.D. Miss. 2010).

> you take that on across you will see after Mr. Lampkin started [Delta Stone] he greatly increased the prices to as high as $36.21 in 2009 and $34.52 in 2010. And the price did not increase that much, the cost to buy it. It was $4.00 a ton in 2003. It was $6.50 in 2010.[43]

Therefore, past profits would show a net profit of a little over seven dollars ($7.00) per ton on a single product; while, during the years lost profits were calculated, the net profit on the same single product was nearly thirty dollars ($30.00) per ton, roughly a four hundred and twenty percent (420%) increase. This factor must be taken into account in calculating future lost profits; and materials promulgated by the AICPA are very clear on this issue. With respect to using the "before and after" method, AICPA Practice Aid 06-4 states, "***the practitioner, however, should consider other factors that could have affected the plaintiff's level of revenues and demonstrate how those factors have been taken into consideration***."[44] Defendants' expert did just that, as well as incorporating variable costs associated with the rock in conformity with reliable principles and methods, including the unreported rock, which will be discussed below.

Defendants have already pointed out the following:

> ***So, under Mississippi law, a plaintiff is entitled to the gross amount that would have been received pursuant to the business that was interrupted by a defendant's wrongful act, less the cost of running the business***. *Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.*, 725 So.2d 902, 914 (Miss.1998) (quoting *Cook Indus., Inc. v. Carlson,* 334 F.Supp. 809, 817 (N.D.Miss.1971)). Variable costs [FN7] related to lost business opportunities (e.g., labor, utilities, etc.) must be deducted from a gross profit estimate. Fixed overhead costs that would have been incurred under any circumstance (e.g., depreciation, rent, etc.) need not be.[FN8] ***Reduced to a simple equation, lost income equals the revenue that would have been generated less those variable costs that would have been incurred in the absence of the complained of breach***. *See Work v. Commercial Underwriters Ins. Co.*, 61 Fed.Appx. 120 (5th Cir.2003), citing *Lovett* and *Sure-Trip, Inc. v. Westinghouse Engineering,* 47 F.3d 526, 531 (2d Cir.1995) ("Where plaintiff is seeking to recover lost profits, such damages are equal to the revenue that would have been derived, less additional costs that would have been incurred").

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[43] (11 R. at 482:8-16).

[44] (7 Supplemental R. at 0940); Richard A. Pollack et al., *AICPA's Practice Aid 06-4; Calculating Lost Profits*, at 25 (2006)(emphasis added).

> FN7. Variable costs include labor, material or overhead that changes according to the change in the volume of production units. Combined with fixed costs, variable costs make up the total cost of production. While the total variable cost changes with increased production, the total fixed costs stays the same. *See* www.investorwords.com.
>
> FN8. Fixed costs, which do not vary depending on production or sales levels, are costs such as rent, property tax, insurance, or interest expense. *See www.investorwords.com.*[45]

Defendants have also shown, via the following, that their expert followed this methodology:

> As Mr. Koerber stated in his report, a Practice Aid promulgated by the AICPA contains the following:
>
> > Only lost "net" profits are allowed as damages. Lost "net" profit is computed, in general, by estimating the gross revenue that would have been earned but for the wrongful act reduced by avoided costs. *Avoided costs* are defined as those incremental costs that were not incurred because of the loss of the revenue. After the net lost profits are determined, any actual profits earned are deducted to compute the damages.
>
> Immediately after this passage, Mr. Koerber begins with the heading, "Gross Revenue," the contents of which describe his calculation of gross revenue by "multiplying the tons of rock reported on the missing invoices by the weighted average sales price of the products." The next heading, "Avoided Costs," lists the following: "1. Direct material (rock) costs, 2. Towing costs, 3. Unloading costs, 4. Direct labor costs, 5. Trucking costs, 6. Fleeting costs, and 7. Repairs and fuel (miscellaneous) costs." Mr. Koerber also includes the following fixed costs as avoided: "1. Taxes & Licenses, 2. Interest Expenses, 3. Depreciation Expense, 4. Advertising, 5. Rent, 6. Bank Charges, 7. Dues & Subscriptions, 8. Insurance, 9. Utilities & Phone, 10. Professional Fees, 11. Office Supplies, 12. Miscellaneous, and 13. Discount Expense." Consistent with his report, Mr. Koerber states the following during his direct testimony when asked about the significance of unreported rock, "Well then this is the evidence of damages you take from there and ***calculate the revenues less variable cost***, you know avoided cost we call it, to come up with what the damages would be."[46]

According to Mississippi law and the AICPA, there are reliable principles and methods for estimating lost profits. Defendants' expert's analysis was in strict conformity with these

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[45] *J&B Entertainment v. City of Jackson, Mississippi,* et al., 720 F. Supp.2d 757, at 764-765 (S.D. Miss. 2010).

[46] Appellants' Br. at 28 (emphasis added).

principles and methods. These very principles and methods were never utilized by Plaintiff's expert and were also completely ignored by the Chancellor.

The increase in sales prices must be taken into account per the AICPA and the applicable case law. The Chancellor should assume that business as usual prior to the breach of fiduciary duty and usurpation continued after the same. Therefore, the correct methodology factors in revenues based on these price increases, less variable costs associated with these sales and rent, as rent was also avoided. The consideration of any other factor is immaterial and incorrect. The Chancellor should not factor in extra expenses, including nonexistence expenses calculated by Plaintiff's expert, based on Delta Stone operating under the complete control of Plaintiff. Rather, with the exception of the increases in sales prices and the avoided rent, this Court should simply utilize expenses incurred by Limestone when the Estate was still participating as a fifty percent (50%) shareholder. If the only things that changed were the increase in sales prices and rent no longer being paid, the company would have undoubtedly been more profitable. The only way the Chancellor could determine the business would not have been more profitable was to deviate from reliable principles and methods utilized in calculating lost profits.

As far as the remainder of this Court's discussion on the Chancellor's methods, Defendants would show that they have already written exhaustively on why Mr. Saunders' use of the term "net book value" is incorrect, as well as why the Chancellor's determination that the phrase is meaningless is flawed; and Defendants' have also written exhaustively as to how the Chancellor sought lost profits in past profits where they would never be found, as well as why Plaintiff's expert incorrectly calculated the value of the converted assets.[47]

[47] Appellants' Reply Br., at 5 – 11.

b. The Unreported Rock.

This Court stated, "[w]ithout providing an caselaw to support their argument, the Executors claim that the chancellor abused his discretion by eliminating the unreported rock from the calculation of Limestone's lost profits."[48] Defendants contend that all applicable case law has been present throughout the pleadings and repeatedly regurgitated. However, the case law alone is insufficient. The case law must be used in conjunction with all reliable principles and methods used within the accounting and financial industries, which, according to Rule 702 of the Mississippi Rules of Evidence, must be considered, adhered to, and applied by our courts in assessing damages in the instant case.

Defendants are confused with this Court's statement that "Lampkin allegedly diverted" rock "from Limestone."[49] Further, there was no "conflicting testimony" as to whether rock was diverted or whether its "whereabouts" were "accounted for."[50] As the dissent pointed out, "[e]ach side's expert witness agreed that tons of rock were diverted by Lampkin from Limestone to either Delta Stone or Lampkin Construction."[51] This is neither alleged nor in dispute. As such, there was no "factual dispute regarding the allegations of unreported rock…"[52] Again, it doesn't matter where this rock was found. The only thing that matters is that this rock was not found in Limestone's books. As such, Limestone never profited from the sale of this rock; thus, this rock should be used in calculating lost profits of Limestone. It defies all logic, reason, law, and equity for the Chancellor to determine that rock was diverted from Limestone, sales of this rock were not attributed to Limestone, and to then determine that it simply doesn't matter and has no bearing on Limestone's profits.

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[48] *Lane v. Lampkin*, at ¶ 38.
[49] *Id*., at ¶ 38.
[50] *Id*., at ¶ 39.
[51] *Id*., at ¶ 61.
[52] *Id*., at ¶ 40.

Again, it is not disputed diverted rock was not reported in Limestone's books. As such, according to the reliable principles and methods, lost profits should be calculated by estimating revenues less avoided costs. By determining the rock was not diverted based on it being found outside of Limestone's books, the Chancellor deviated from reliable principles and methods by looking at the books of Delta Stone and factoring in expenses that should not have been present in a lost profits analysis. The correct analysis is to estimate revenues less variable costs based on an assumption that business as usual would continue but for the acts of Plaintiff. As such, the Chancellor abused his discretion by deviating from reliable principles and methods, instead opting to use methods that enjoy no acceptance whatsoever within the appropriate communities.

c. The Lease-Agreement Payments.

Defendants are dumbfounded as to why this Court found no abuse of discretion in the Chancellor's failure to award damages based on a valid lease. It is undisputed there was a valid lease. It is undisputed the lease remained in effect. It is undisputed Plaintiff remained on the property as the lessee or tenant and paid no rent. It is undisputed that both expert witnesses determined rent should be factored into any damages. Although it is readily apparent the Chancellor was somewhat confused on this issue, it is also undisputed that Limestone was the lessee and the two (2) shareholders were, collectively, the lessor.

In support of their argument, Defendants offered multiple citations to case law containing black letter law regarding leases, as well as black letter law regarding piercing the corporate veil.[53] Plaintiff offered no law on these issues. The Chancellor never discussed any law on these issues. This Court never discussed any law on these issues. Considering the amount of emphasis this Court, via its Opinion, has placed on citing authority; it defies reason and logic to determine this argument lacks merit, especially where Defendants have been the only party to offer any law

[53] Appellants Br., at 53-57; Appellants' Reply Br., at 17 – 19.

on the issue, all of which is all black letter law. It cannot be denied that a shareholder is not responsible for the debts and obligations of the corporation solely by virtue of being a shareholder. The Defendants contend that the Chancellor absolutely abused his discretion, as his decision not to award damages based on the lease ignored all undisputed facts and all relevant black letter law on the issue.

Again, although rent is usually a fixed cost that should not be factored in a lost profits analysis; the fact that rent was not paid rendered this rent an avoided cost. Therefore, if Limestone no longer had to pay rent, as it had previously done, Limestone's profits would also increase. If a business continually pays rent and then ceases paying this rent, its profits are directly increased each month by the amount of rent it was otherwise required to pay. If an expense vanishes, profits increase. This cannot be disputed. Further, if business had continued as usual, with the exception of the increases in sales prices less variable costs associated with these sales, Limestone would have had the ability to pay rent pursuant to the valid lease agreement that remained in force, as it was required to do. However, no rent was paid; as such, rent became an avoided cost should be included in estimating lost profits. Whether this rent is awarded as lost profits to Limestone or damages to the Estate pursuant to the lease does not matter, as long as one (1) of the two (2) is done. If the rent is awarded as lost profits, the Estate is entitled to one-half (1/2). If the damages are paid directly to the Estate pursuant to the lease agreement, the Estate will receive the same amount of money.

III. Whether the Chancellor erred by refusing to award attorneys' fees and expert-witness fees.

Defendants have repeatedly pointed out the following:

> In *Aqua-Culture Technologies, Ltd. v. Holly*, the Mississippi Supreme Court upheld an award of attorney's fees against the "improperly-acting shareholder." The award was upheld "on the basis that the shareholder's conduct was so

> egregious that it would have supported an award of punitive damages, ***even though such an award was not made at the trial level, and that attorney's fees are proper in cases where punitive damages are justified***."[54]

Therefore, this Court is completely within its discretion to award attorneys' fees and expert witness fees. Even if punitive damages were not justified, statutes allow an award of attorneys' fees and expert witness fees under the circumstances in the instant action. "If the court finds that the petitioning shareholder had probable grounds for relief under paragraphs (ii) or (iv) of Section 79–4–14.30(2), it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by him."[55] Section 79-4-14.30(2)(ii) and (iv) involve situations where "(ii) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent;" and "(iv) The corporate assets are being misapplied or wasted."[56]

In *Aqua-Culture Technologies, Ltd. v. Holly*, the Mississippi Supreme Court upheld an award of attorney's fees against the "improperly-acting shareholder."[57] The award was upheld "on the basis that the shareholder's conduct was so egregious that it would have supported an award of punitive damages, even though such an award was not made at the trial level, and that attorney's fees are proper in cases where punitive damages are justified."[58] A determination of whether punitive damages should be awarded "depends largely upon the particular circumstances of the case."[59] "A trial judge should be granted the flexibility to find that, although the actual awarding of punitive damages is inappropriate, the conduct of the defendant is so extreme and

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[54] Appellants' Br. at 59; *see also Covington v. Covington*, 780 So.2d 665, 671 (¶ 14) (Miss. Ct. App. 2001) (*citing Aqua-Culture*, at 184)(emphasis added).
[55] Miss. Code Ann. § 79-4-14-34(e).
[56] Miss. Code Ann. § 79-4-14.30.
[57] *Covington v. Covington*, 780 So.2d 665, 671 (¶ 14) (Miss. Ct. App. 2001) (*citing Aqua-Culture,* at 184).
[58] *Id.*
[59] *Aqua-Culture* at 184.

outrageous that he, rather than the plaintiff, should bear the expense of litigation.[60] The Court in *Aqua-Culture* continued:

> This Court's holding in *Greenlee* and other cases was that attorney fees may be awarded in cases in which the awarding of punitive damages is *proper*. This Court did not hold in *Greenlee* that the actual awarding of punitive damages was a prerequisite for the awarding of attorney fees, and ***we expressly hold here that such an actual awarding of punitive damages is not a prerequisite for the awarding of attorney fees***."[61]

Punitive damages are permissible for wrongs that "import insult, fraud or oppression and not merely injuries but injuries inflicted in the spirit of wanton disregard for the rights of others."[62] The Supreme Court of Mississippi has held that a "corporate freeze out is an intentional tort that is committed with willful and wanton disregard for the right of the shareholder frozen out."[63] The Court also stated that a commission of gross negligence by breaching a fiduciary duty owed a minority shareholder and ***not permitting a minority shareholder to participate as a shareholder are both actions that justify punitive damages***.[64]

Perhaps the Chancellor did not find Plaintiff's conduct so egregious as to warrant punitive damages, because the Chancellor failed to understand the issues of the case, the facts, the applicable law, the reliable principles and methods utilized in a lost profits analysis, and the testimony of the experts, specifically, why Plaintiff's expert was entirely incorrect and why Defendants' expert was entirely in conformity with reliable principles and methods. Therefore, Defendants contend this portion of the Chancellor's opinion cannot possibly be affirmed where the entire remainder of the opinion is contrary to the issues of the case, the facts, the applicable law, and the reliable principles and methods utilized in a lost profits analysis.

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[60] *Id.* at 184-5.
[61] *Aqua Culture*, at 185 (emphasis added).
[62] *Wise v. Valley Bank*, 861 So.2d 1029, 1034 (¶ 12) (Miss. 2003) (*citing First National Bank v. Langley*, 314 So.2d 324, 339 (Miss. 1975)).
[63] *Missala Marine Services, Inc. v. Odom*, 861 So.2d 290, 295 (¶ 22) (Miss. 2003).
[64] *Id.*(emphasis added).

Based on the present facts, Defendants assert the actions of Plaintiff rise to the level of egregiousness warranting the imposition of punitive damages. Plaintiff began diverting profits from the company owned equally by himself and J.O. Smith, Jr. before Smith's death and continued to do so after Smith's death. Plaintiff's actions amount to more than what would be considered a simple breach of fiduciary duty. After Smith, a fifty percent (50%) shareholder, died, Lampkin insisted Smith's estate guarantee a line of credit. In order to make a decision with respect to this line of credit, the Estate requested they be allowed to inspect the books and records of the company, as it was their undeniable right to do so as shareholders. Yet, Lampkin would not permit the shareholders to inspect the records. If the line of credit was as important as Lampkin testified, why would he not do everything he could to ensure its guarantee? Not to mention, he could have at least done things he was under a duty to do under the law. Then, after refusing to allow the Estate to review the books and records of the company in violation of the law, Lampkin unilaterally shut down the company, replacing it with a company under a different name, but utilizing all assets previously held by Limestone. Basically, although Limestone remained a valid entity and a going concern, Plaintiff unilaterally "dissolved" Limestone and distributed all of its assets to himself, or Delta Stone, effectively converting the assets. Then, Plaintiff continued converting the assets based on the diverted or unreported rock, and the Plaintiff left any profits based on sales of this diverted rock off Limestone's book. As such, these profits were lost to Limestone. Lampkin essentially stole a company once the other fifty percent (50%) shareholder died, refused to allow the Estate to exercise its rights under the law with respect to the company, and deprived the family of the deceased any participation in the business and rights to its profits for multiple years, profits that, based on reliable principles and methods, now total in excess of one million dollars ($1,000,000.00). If this conduct does not

warrant punitive damages, Defendants do not know what conduct would. Regardless, the statutes above allow for an award of attorney fees and expert witness fees.

CONCLUSION

In summation, the lower court abused its discretion by not awarding adequate damages to Limestone under the laws of the State of Mississippi, as well as in accordance with reliable methods accepted within the accounting and valuation industries. Specifically, the lower court abused its discretion in accepting Mr. Saunders' valuation of the converted assets; and the lower court abused its discretion in failing to award damages due to lost profits, opting instead to utilize actual net income. Also, the lower court abused its discretion in failing to award damages based on that certain lease agreement discussed herein. Finally, the lower court abused its discretion in failing to award attorney's fees by finding Lampkin's conduct did not warrant punitive damages. With respect to the lost profits issue, the Defendants concede that the issue can be very complicated. Nonetheless, accepted methodologies and Mississippi case law are clear with respect to this issue; and damages must be determined in accordance with methodologies commonly relied upon and accepted within the accounting and valuation communities, as opposed to the trial court's determination based on inappropriate and unaccepted methodologies. Therefore, Defendants contend that the proper remedy is an award of damages consistent with said accepted methodologies and Mississippi case law.

CERTIFICATE OF SERVICE

I, Harris H. Barnes, III, one of the attorneys of record for Appellants, Ernest Lane, III, Co-Executor of the Estate of J.O. Smith, Jr. and Limestone Products, Inc., certify that I have this day electronically filed this Petition for Rehearing with the Clerk of this Court using the MEC system, which sent notification of such filing to the following:

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SO CERTIFIED, this the 30th day of September, 2014.

By: s/ Harris H. Barnes, III
Harris H. Barnes, III, Esq. (MSB #2018)